No. 88-910

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

AMOS D. FAUX-BURHANS,

Petitioner,

vs.

BOARD OF COUNTY COMMISSIONERS OF FREDERICK COUNTY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN S. MATHIAS
County Attorney
Counsel of Record
JOSEPH E. EMERSON
Deputy County Attorney
Attorneys for Respondent
Office of the County Attorney
Winchester Hall
12 East Church Street
Frederick, Maryland 21701
(301) 694-1030

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TABLE OF CONTENTS

	Page
LIST OF ALL PARTIES	v
STATEMENT OF THE CASE	vi
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. The Fourth Circuit Decision Does Not Conflict with Any Decision from the Circuit Courts of Appeal.	2
II. The Fourth Circuit Decision Does Not Conflict with Any Decision of this Court.	11
III. The Fourth Circuit Court of Appeals Did Not Decide an Important Question of Federal Law.	14
CONCLUSION	15

TABLE OF AUTHORITIES

Cases

	Page
Allegheny Airlines v. Village of Cedarhurst, 238 F.2d 812 (2d Cir. 1956)	6-7
American Airlines v. Town of Hempstead, 398 F.2d 369 (2d Cir. 1968), cert denied 393 U.S. 1017 (1969)	7
British Airways v. Port Auth. of N.Y., 558 F.2d 75, 83 (2nd Cir. 1977)	5
City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973)	5, 6, 12, 13, 14
Faux-Burhans v. Bd. of County Comm'rs. of Frederick County, 674 F. Supp. 1172 (D. Md. 1987)	3
Faux-Burhans v. Bd. of County Comm'rs. of Frederick County, No. 88-3929 (4th Cir. 1988) petition for cert. filed, 57 U.S.L.W. 3423 (U.S. Dec. 20, 1988) (No. 88-910)	3, 4, 11
Garden State Farms, Inc. v. Bay, 77 N.J. 439, 390 A.2d 1177 (N.J. 1978)	9
La Salle Nat'l Bank v. County of Cook, 34 Ill. App. 3d 264, 340 N.E.2d 79 (Ill. App. Ct. 1975)	9

Lockheed Air Terminal, Inc. v. City of Burbank, 457 F.2d 667 (9th Cir. 1972), aff'd 411 U.S. 624 (1973) 5

Northwest Airlines v. Minnesota, 322 U.S. 292 (1944) 12

Pirolo v. City of Clearwater, 711 F.2d 1006 (11th Cir. 1983) 6

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 10

San Diego Unified Port District v. Gianturco, 651 F.2d 1306 (9th Cir. 1981), cert. denied sub nom. Dept. of Trans. of Calif. v. San Diego Unified Port District, 455 U.S. 1000 (1982). 6

Santa Monica Airport Assn. v. City of Santa Monica, 659 F.2d 100 (9th Cir. 1981) 5

U.S. v. Causby, 328 U.S. 256 (1946) 11

United States v. New Haven, 447 F.2d 972 (2d Cir. 1971), on rem. 367 F. Supp. 1338 (D. Conn. 1973), aff'd 496 F.2d 452 (2d Cir. 1974) cert. denied 419 U.S. 958 (1974) 7

Wright v. County of Winnebago, 73 Ill. App. 3d 337, 391 N.E.2d 772 (Ill. App. Ct. 1979) 9

Constitutional Provisions

U.S. Const. Art. VI, cl. 2 8

Statutes

42 U.S.C. § 4901-4918 13

49 U.S.C. § 1305 10

Treatise

5 Rathkopf, The Law of Zoning and Planning § 60.01 (4th ed. 1988) 9

LIST OF ALL PARTIES

Respondent is the Board of County Commissioners of Frederick County, Maryland. The five county commissioners are:

J. Anita Stup, President
Mark L. Hoke, Vice President
Sterling E. Bollinger, Sr.
Richard L. Grossnickle
Charles C. Smith

The individual commissioners are not parties to this proceeding.

STATEMENT OF THE CASE

The district court granted the motion for summary judgment filed by the Board of County Commissioners of Frederick County, Maryland. Faux-Burhans v. County Comm'rs. of Frederick County, 674 F. Supp. 1172 (D. Md. 1987). Pet. App. B. In an unpublished per curiam opinion, the Fourth Circuit affirmed. Faux-Burhans v. Bd. of County Comm'rs. of Frederick County, No. 88-3929 (4th Cir. 1988) Pet. App. A and C. The facts of this case are adequately discussed in the two lower court decisions, so they need not be repeated here.

No. 88-910

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

AMOS D. FAUX-BURHANS,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS
OF FREDERICK COUNTY,

Respondent,

SUMMARY OF ARGUMENT

Petitioner has failed to identify any conflict between local zoning and federal regulation of aviation. The Fourth Circuit decision does not conflict with any of the cases cited by Petitioner. It involves no important questions of federal law. The Petition should be denied.

ARGUMENT

The three grounds asserted in this Petition do not constitute valid reasons for granting the Writ of Certiorari. This Petition should be denied.

I. The Fourth Circuit Decision Does Not Conflict with Any Decision from the Circuit Courts of Appeal.

Petitioner ascribes to the Fourth Circuit decision the broadest sweep since Hercules cleaned the Augean stables. Petitioner characterizes the holding as: "Federal Law Does Not Preempt Zoning of Navigable Airspace By a Local Government." Pet. at 9. The Fourth Circuit's decision is not nearly so broad. In an unpublished per curiam decision, the Fourth Circuit made short shrift of Petitioner's broad pronouncements that federal sovereignty over all

navigable airspace precluded local zoning of airports. The Court then held:

> Faux-Burhans has not, however, identified any federal statute or regulation explicitly or implicitly preempting the regulations imposed by the county ordinance involved here nor has he demonstrated any actual conflict between federal statutes or regulations and the county requirements.

Faux-Burhans v. Bd. of County Comm'rs. of Frederick County, No. 88-3929 (4th Cir. 1988) petition for cert. filed, 57 U.S.L.W. 3423 (U.S. Dec. 20, 1988) (No. 88-910) Pet. App. at A-6.

The District Court similarly noted:

> In the instant case, plaintiff can point to no federal statute or regulation explicitly or implicitly pre-empting the broad areas of regulation of the size, scope, and manner of operations at a private airport such as his.

Faux-Burhans v. Bd. of County Comm'rs. of Frederick County, 674 F. Supp. 1172, 1174 (D. Md. 1987).

Petitioner has now briefed this matter in three courts and has not yet pointed to any conflict between the

local ordinance and the federal statutes and regulations. The reason is simple: no conflict exists.

Petitioner asserts that several circuit court decisions are in conflict with the Fourth Circuit opinion. None of these decisions, however, conflicts with the real holding of the Fourth Circuit -- that Petitioner has not identified a conflict. The cases cited by Petitioner can be distinguished from Faux Burhans because each of the circuit court decisions identifies a conflict between a local ordinance and a federal statute or regulation. Petitioner has identified no conflict.

Petitioner asserts a federal pre-emption of local zoning. None of the circuit court decisions cited by Petitioner stands for such a broad proposition. In fact, none of these cases involves zoning.

Petitioner alleges a conflict with the 9th Circuit decision in Lockheed Air Terminal, Inc. v. City of Burbank, 457 F.2d 667 (9th Cir. 1972), aff'd 411 U.S. 624 (1973). This Court affirmed the 9th Circuit decision holding that federal noise controls preempted local curfews affecting air traffic schedules.[1] City of Burbank v. Lockheed Air Terminal, Inc. 411 U.S. 624 (1973). No zoning ordinances were involved so neither this court nor the 9th Circuit based its decision on federal preemption of zoning. Petitioner's contrary assertions are not accurate.

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[1]The Circuit Courts of Appeals have interpreted this decision narrowly and have not extended it beyond noise control. See, British Airways v. Port Auth. of N.Y., 558 F.2d 75, 83 (2nd Cir. 1977); Santa Monica Airport Assn. v. City of Santa Monica, 659 F.2d 100 (9th Cir. 1981).

Two of the other cases cited by Petitioner followed City of Burbank and similarly held that federal noise controls preempted local curfews. Pirolo v. City of Clearwater, 711 F.2d 1006 (11th Cir. 1983); San Diego Unified Port District v. Gianturco, 651 F.2d 1306 (9th Cir. 1981), cert. denied sub nom. Dept. of Trans. of Calif. v. San Diego Unified Port District, 455 U.S. 1000 (1982). Again, zoning was not involved, so the courts did not find any broad federal preemption of local zoning.

The Court similarly promulgated no broad statement of general federal preemption of zoning in Allegheny Airlines v. Village of Cedarhurst, 238

F.2d 812 (2d Cir. 1956). This case involved an ordinance by a neighboring village restricting Idlewild Airport flights at elevations less than 1,000 feet. This ordinance directly conflicted with Civil Aeronautics Board regulations on landings and takeoffs. American Airlines v. Town of Hempstead, 398 F.2d 369 (2d Cir. 1968), cert denied 393 U.S. 1017 (1969) involved a local noise ordinance which directly conflicted with Federal Aviation Administration (FAA) regulations on flight patterns and flying procedures. In United States v. New Haven, 447 F.2d 972 (2d Cir. 1971), on rem. 367 F. Supp. 1338 (D. Conn. 1973), aff'd 496 F.2d 452 (2d Cir. 1974) cert. denied 419 U.S. 958 (1974), a state court ordered

the closing of a runway at a federally-funded airport. The state order conflicted with clear zones established by the FAA and with the FAA's control of navigable airspace at this federally-funded airport. All three of these cases stand for the ordinary principle of law that, under the Supremacy Clause, U.S. Const. Art. VI, cl. 2, federal law prevails where there is a direct conflict between local and federal regulations. Because Petitioner has not identified such a conflict, the cases do not support Petitioner's contention. Once again, none of these cases involved zoning. Contrary to Petitioner's assertions, the cases do not establish a broad federal preemption of all local zoning.

State courts considering this issue have found no broad federal preemption of local zoning. The decisions have held that local zoning of airports is valid. E.g., Wright v. County of Winnebago, 73 Ill. App. 3d 337, 391 N.E.2d 772 (Ill. App. Ct. 1979); La Salle Nat'l Bank v. County of Cook, 34 Ill. App. 3d 264, 340 N.E.2d 79 (Ill. App. Ct. 1975); Garden State Farms, Inc. v. Bay, 77 N.J. 439, 390 A.2d 1177 (N.J. 1978). See, 5 Rathkopf, The Law of Zoning and Planning §60.01 (4th ed. 1988).

Petitioner has cited no case broadly holding that federal law preempts local zoning of navigable airspace. This Court should not create such a pre-emption. Sound policy reasons suggest

that zoning power should remain with local government. As this court stated in Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947):

> Congress legislated here in a field which the States have traditionally occupied.... So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Petitioner has shown nothing to suggest that "the clear and manifest purpose of Congress" was to preempt all local zoning in this area.[2] Petitioner's broad preemption argument must fail.

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[2]If Congress had intended a preemption of zoning, a power traditionally exercised by local government, it could have specifically done so in the statute. Congress did expressly preempt other state regulation of air transportation. 49 U.S.C. §1305. Congress did not expressly preempt zoning.

II. The Fourth Circuit Decision Does Not Conflict with Any Decision of this Court.

Petitioner cites three cases from this Court; none conflicts with the holding of the Fourth Circuit in Faux-Burhans. Petitioner includes lengthy quotations from two of the Supreme Court decisions but does not seriously argue a conflict between these cases and the 4th Circuit decision.

In U. S. v. Causby, 328 U.S. 256 (1946), this Court held that the federal government could be liable in inverse condemnation for damage to landowners near an airport.[3] The relevance of this case is unclear. Petitioner does

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[3]Petitioner's excerpt from U.S. v. Causby is incomplete. Pet. at 24-25. The very next sentence of the opinion states: "But that general principle does not control the present case." Id. at 261.

not seek inverse condemnation damages. This decision and the decision of the Fourth Circuit do not conflict.

Petitioner also cites Northwest Airlines v. Minnesota, 322 U.S. 292 (1944). This case held that the Commerce Clause and the Due Process Clause do not bar Minnesota from levying a personal property tax on airplanes. Preemption was not an issue. The case is inapplicable here.[4]

Petitioner also alleges a conflict with City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624 (1973). In City of Burbank, this Court held that federal law preempted local noise controls at airports. A locally imposed

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[4]The Petition includes a lengthy quotation not from Justice Frankfurter's opinion for the Court but from Justice Jackson's concurrence. Pet. at 23-24. No other justice joined in this concurrence.

curfew conflicted with the Noise Control Act of 1972, 42 U.S.C. §4901-4918, and FAA statutes and regulations. This Court carefully limited its decision to noise control only:

> It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads me to conclude that there is pre-emption. (emphasis added). City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. at 633.

Petitioner here has not asserted any local noise ordinances or any conflict with federal noise regulations, so City of Burbank is inapplicable. . The decision of the Fourth Circuit is consistent with City of Burbank.[5]

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[5]Petitioner asserts that Congress has empowered only the FAA Administrator to impose the restrictions contained in the Frederick County ordinance. Pet. at 22. Petitioner confuses the possible existence of a power with the exercise of it. Nowhere does Petitioner suggest that the FAA Administrator has asserted, let alone used, this alleged power.

Moreover, then Justice Rehnquist's dissent (joined by three justices) recognized that federal law does not preempt local zoning:

> A local governing body could likewise use its traditional police power to prevent the establishment of a new airport or the expansion of an existing one within its territorial jurisdiction by declining to grant the necessary zoning for such a facility. City of Burbank v. Lockheed Air Terminal, 411 U.S. at 653.

III. The Fourth Circuit Court of Appeals Did Not Decide an Important Question of Federal Law.

As indicated above, the holding of the Fourth Circuit is that Petitioner failed to show any conflict between the local ordinance and federal regulations. This rather unremarkable holding, that Petitioner failed to prove his case, involves no important federal question. Petitioner's assertions of resulting air collisions and chaos are so desperate and absurd that they require no refutation or comment.

Conclusion

Petitioner has failed to show any grounds for granting this Petition for Writ of Certiorari. This Petition must be denied.

JOHN S. MATHIAS
County Attorney
Winchester Hall
12 E. Church Street
Frederick, Maryland 21701
(301) 694-1030
Counsel of Record for
Board of County Commissioners
of Frederick County, Maryland

I HEREBY CERTIFY that on this 30th day of December, 1988, three copies of the aforegoing were mailed, postage prepaid, to Paul Victor Jorgensen, 215 West Main Street, Post Office Box 850, Middletown, Maryland 21769, attorney for Petitioner in accordance with Supreme Court Rule 28.3.

John S. Mathias
12 E. Church Street
Frederick, Maryland 21701
(301) 694-1030
Counsel of Record for
Board of County Commissioners
of Frederick County, Maryland